

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

IN THE MATTER OF:	:	CASE NUMBER
	:	
RUTH EVELYN CONKLE,	:	04-66229-WHD
	:	
	:	IN PROCEEDINGS UNDER
	:	CHAPTER 13 OF THE
DEBTOR.	:	BANKRUPTCY CODE

ORDER

Before the Court is the application for approval of compensation filed in the above-captioned bankruptcy proceeding by Neil Gordon, in his capacity as trustee for the former Chapter 7 estate of Ruth Conkle (hereinafter the "Debtor"), and the law firm of Arnall, Golden, Gregory, LLP (hereinafter the "Firm"), as attorney for the Trustee. The Debtor has objected to the requested compensation. Following a hearing on the applications, the Court took the matter under advisement. This matter constitutes a core proceeding within the subject matter jurisdiction of the Court, *see* 28 U.S.C. § 157(b)(2)(B), and it shall be disposed of in accordance with the following reasoning.

BACKGROUND

On April 14, 2004, the Debtor filed a voluntary petition under Chapter 7 of the Bankruptcy Code. Neil Gordon (hereinafter the "Trustee") was appointed as the Chapter 7 Trustee of the Debtor's bankruptcy estate. Prior to filing her petition, the Debtor owned certain real property known as 6787 Wendy Jean Drive, Morrow, Georgia (hereinafter the

“Property”). The Property was and remains unencumbered and has an apparent value of at least \$125,000. Prior to the first meeting of creditors, the Trustee discovered that the Debtor had transferred the Property to her daughter, Penelope E. DeMarco for no consideration on approximately September 3, 2003. At the creditors' meeting, which was held on May 24, 2004, the Trustee questioned the Debtor regarding the transfer of the Property, and the Debtor denied the transfer until she was confronted with a copy of the recorded deed.

On May 25, 2004, the Trustee filed an application to employ the Firm as attorney to the trustee at rates varying from \$75 per hour to \$335 per hour.¹ An order approving the employment was entered on June 7, 2004. No objections to the application were filed.

On June 4, 2004, the Trustee filed a complaint objecting to the Debtor's discharge and seeking avoidance of the transfer and recovery of the Property. As a means of resolving the litigation, the Trustee proposed that the Debtor's daughter return the Property to the Debtor to allow the Debtor to take out a modest mortgage as a means of satisfying her approximately \$44,000 of debt. In response to the Trustee's complaint, on July 6, 2004, the

¹ During the hearing, the Debtor suggested that the Firm's compensation should be denied or reduced because the employment application stated that the purpose of the employment was to assist the Trustee in liquidating the Property and the Trustee never in fact liquidated the Property. This argument has no merit. The application actually states that the employment was necessary to assist the Trustee in *recovering* assets for liquidation. The application is perfectly clear as to why the Trustee is seeking employment of the Firm, and, in fact, the Trustee's actions were instrumental in effectuating the recovery of the Property. The fact that the Debtor was permitted to convert her case to Chapter 13 prior to the Trustee's liquidation of the Property should not result in a denial of compensation for the Trustee and the Firm.

Debtor filed a motion to convert her bankruptcy case from Chapter 13 to Chapter 7. The Trustee objected to the conversion. Following a hearing on August 9, 2004, the Court entered an order allowing the Debtor to convert to Chapter 13 on the condition that the Trustee first be presented with a recorded deed evidencing the transfer of the Property from the Debtor's daughter to the Debtor. On November 22, 2004, the Debtor's case was officially converted to Chapter 13.

On December 17, 2004, the Trustee filed an application for compensation for time spent by himself and by the Firm. The Debtor filed a written objection to the application on January 13, 2005. Following a hearing held on January 24, 2005, the Court took this matter under advisement.

CONCLUSIONS OF LAW

These applications require the Court to determine whether the Debtor's Chapter 13 estate is liable for payment of fees for services rendered by the Trustee and the Firm.

A. Trustee's Fees

Chapter 7 trustees are compensated in accordance with § 326(a), which states that “the court may allow reasonable compensation under section 330 of this title of the trustee for the trustee's services, payable after the trustee renders such services, not to exceed 25 percent . . . of all moneys disbursed or turned over in the case by the trustee to parties in interest, excluding the debtor, but including holders of secured claims.” 11 U.S.C. § 326(a).

In a case in which the Chapter 7 trustee has not disbursed or turned over any funds, “[u]nder a literal reading of Section 326, it is clear that no compensation is payable.” *In re Roberts*, 80 B.R. 565, 568 (Bankr. N.D. Ga. 1987) (Cotton, J.); *see also In re Wells*, 87 B.R. 732, 736 (Bankr. N.D. Ga. 1988) (Cotton, J.). “Some courts however have recognized that at least a *quantum meruit* claim is allowable.” *In re Roberts*, 80 B.R. 565, 568 (Bankr. N.D. Ga. 1987); *see also Schilling v. Kinslow*, 287 B.R. 394 (W.D. Ky. 2002) (“In a case that has been converted from Chapter 7 to Chapter 13 prior to liquidation of assets, the Chapter 7 trustee should be compensated on a *quantum meruit* basis ‘where the trustee performs substantial services that result in discovery of assets for the benefit of creditor.’”). “In these cases, the correct analysis for determining compensation is found in 11 U.S.C. § 330(a)(3)(A-E).” *Schilling v. Kinslow*, 287 B.R. at 395.

Section 330 provides that the Court may award to a trustee, an examiner, a professional person employed under section 327 . . . reasonable compensation for actual, necessary services rendered by the trustee . . . and . . . reimbursement for actual, necessary expenses.” 11 U.S.C. § 330. In determining what is reasonable, the Court must consider “the nature, the extent, and the value of such services, taking into account all relevant factors, including” the time spent, the rates charged, the customary compensation charged in non-bankruptcy matters, whether “the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of” the case, and “whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task

addressed.” *Id.* § 330(a)(3)(A). Additionally, the Court must not allow compensation for services that were duplicative or for services that were not reasonably likely to benefit the debtor’s estate or necessary to the administration of the case. *Id.* § 330(a)(4).

The Debtor has objected to the total requested compensation in connection with the Debtor's case on the grounds that the fees for services rendered by the Trustee's counsel are unreasonably high. The compensation actually requested by the Trustee for services rendered in his capacity as the Chapter 7 trustee totals only \$792.50. The Court infers from the statements made by Debtor's counsel during the hearing that the Debtor has no objection to the fees requested by the Trustee himself. Having reviewed the time entries, the Court does not find that these amounts are objectionable in any way.

B. Fees Requested by the Firm

The Debtor has objected to the \$14,080 in fees requested by the Firm on the basis that the fees requested are unreasonably high under the circumstances. As to the reasonableness of the compensation sought by the Firm:

As described in *In re First Colonial Corp. of America*, 544 F.2d at 1299, and its progeny, *Matter of U.S. Golf Corp.*, 639 F.2d at 1201, *In re Beverly Mfg. Corp.*, 841 F.2d 365, 370 (11th Cir.1988), and *Grant v. George Schumann Tire & Battery Co.*, 908 F.2d at 877, determining a reasonable fee in bankruptcy is a three step process.

First, the bankruptcy judge must ascertain the nature and extent of the services supplied by the applicant. To that end, each applicant seeking compensation must file a statement which, in essence, recites the number of hours worked and which contains a description of how each of those hours was spent. If there are disputed issues of fact relating to the application, an

evidentiary hearing must be held.

Second, once the nature and extent of the services have been determined, the bankruptcy judge must assess the value of those services, that is the reasonableness and necessity of the hours claimed and the hourly rate requested. A determination of the reasonableness and necessity of hours and rates requires consideration of the twelve factors first enunciated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 171-719 (5th Cir.1974), a civil rights case, and made applicable to fee determinations in bankruptcy in *In re First Colonial Corp. of America*, 544 F.2d at 1298-1299. These are: (1) The time and labor required; (2) The novelty and difficulty of the questions; (3) The skill requisite to perform the legal service properly; (4) The preclusion of other employment by the attorney due to acceptance of the case; (5) The customary fee; (6) Whether the fee is fixed or contingent; (7) Time limitations imposed by the client or other circumstances; (8) The amount involved and the results obtained; (9) The experience, reputation, and ability of the attorneys; (10) The "undesirability" of the case; (11) The nature and length of the professional relationship with the client; and, (12) Awards in similar cases. *Matter of U.S. Golf Corp.*, 639 F.2d at 1201; *Grant v. George Schumann Tire & Battery Co.*, 908 F.2d at 877. A reasonable fee may then be determined by multiplying the reasonable hourly rate by the number of hours reasonably expended. *Grant v. George Schumann Tire & Battery Co.*, 908 F.2d at 874.

Third, once the amount of reasonable compensation has been determined, the bankruptcy judge must briefly explain the findings and reasons upon which the award is based, including an indication of how each of the twelve factors affected the decision. *In re First Colonial Corp. of America*, 544 F.2d at 1300; *Matter of U.S. Golf Corp.*, 639 F.2d at 1202; *Grant v. George Schumann Tire & Battery Co.*, 908 F.2d at 878.

The purpose of the last requirement is to make the review of the fee determination meaningful. What is expected is "... not a meaningless exercise in parroting and answering each of *Johnson's* twelve criteria, but some assurance that the court has arrived at a just compensation based upon appropriate standards." *Matter of U.S. Golf Corp.*, 639 F.2d at 1206, quoting, *Davis v. Fletcher*, 598 F.2d 469, 470-71 (5th Cir.1979). However the "court's order on attorney's fees only need be specific enough to allow meaningful review...." *Grant v. George Schumann Tire & Battery Co.*, 908 F.2d at 878, n. 10. Even though a bankruptcy court's fee determination may not explicitly state which of the findings was made pursuant to which of the twelve factors,

the fee determination is sufficient if it is otherwise “clear that the court considered those factors.” *Id.*

In re Health Science Products, Inc., 191 B.R. 895, 910 n.20 (Bankr. N.D. Ala. 1995).

In this case, the Firm has filed a statement that includes the number of hours worked and a description of how each of those hours was spent. Because the Debtor does not contend that the Firm did not in fact render these services, there is no need for a further evidentiary hearing.

The Court must now determine whether the amount of hours claimed were necessary and whether the hourly rate requested is reasonable. This determination requires the Court to consider the *Johnson v. Georgia Highway* factors listed above. The Court has closely reviewed the time entries submitted by the Firm and has concluded that the time and labor spent on these litigation matters was necessary for the proper administration of the Debtor's case and resulted in a substantial benefit to the Debtor's creditors. The steps taken by the Trustee and the Trustee's counsel were reasonable under the circumstances and, in fact, were mandated by the Trustee's fiduciary duties. The Trustee succeeded in persuading the Debtor to convert her case to Chapter 13 and to file a proposed plan that contemplates payment of 100% of unsecured claims. Had the Trustee not acted, the Debtor likely would have succeeded in discharging approximately \$39,000 of unsecured debt. Even if the Debtor's proposed Chapter 13 plan is not confirmable, it is expected that her case would be converted back to a case under Chapter 7, at which point, the Trustee would commence liquidation of the Property for the benefit of creditors, who would be paid in full out of the

substantial equity, or the Debtor would finally take the Trustee's advice and mortgage the property as a means of retaining it while satisfying her debts. In either event the actions of the Trustee, which he could not have accomplished without legal services rendered by the Firm, changed the result in the case from zero distribution to creditors to full payment of creditors. The Court also finds that, even at the point in time when the Debtor filed her motion to convert her case to Chapter 13, the Trustee reasonably believed that it would be in the best interest of the Debtor's creditors for the Debtor to remain in Chapter 7 and to obtain a mortgage on the Property, rather than requiring her creditors to wait for payment through a five-year Chapter 13 case. Given recent case law regarding the issue of Chapter 7 to Chapter 13 conversions, the Trustee reasonably believed that the Court would deny the Debtor's motion to convert and allow his adversary proceeding to proceed.

As to the particular legal services rendered by the Firm, the time spent does not appear excessive or duplicative, and the Court has been presented with no evidence or reason to question the amount of time spent on these activities. Just over 13 hours of time was spent on tasks prior to the filing of the Debtor's motion to convert. These included research and preparation of pleadings in connection with the Trustee's complaint objecting to the Debtor's discharge and seeking recovery of the Property. All of these actions were made necessary by the Debtor's own conduct. Following the filing of the motion to convert, significant time was spent researching the issue of whether a bankruptcy court has the authority to deny a first-time motion to convert from Chapter 7 to Chapter 13 and preparing an objection to the conversion and a detailed memorandum of law. Given the current state

of the law on this issue, the Court finds it reasonable that the Firm devoted this amount of time to this issue. Following the filing of the objection, the Firm was required to attend the hearing on the motion to convert, and, thereafter, to follow up with the Debtor and prepare a proposed order, as requested by the Court. All of these services were necessary to assist the Trustee in discharging his duties and flowed as a consequence of the Debtor's choice to transfer the Property and to later convert her case to one under Chapter 13. The Court further finds that the Firm acted quite reasonably by using paralegals to complete tasks of a more clerical nature, rather than incurring more expensive attorney time. For instance, paralegal time was used to prepare certain documents, such as the application to employ the Firm and the summons, and to accomplish tasks such as service of pleadings.²

As to the hourly rate sought, the Court must determine whether a blended rate for attorney and paralegal time of \$285 per hour is reasonable. This rate is comprised of hourly rates for the attorneys who spent the most time on this case in the primary amount of \$325 and \$210 per hour and hourly rates for the paralegals at \$120 and \$125 per hour. These are the normal hourly rates charged by these professionals, and the Court sees no reason to adjust the regular rates. As discussed above, the Court must consider the time and labor

² The Court also notes that the Firm is not requesting compensation for any services rendered after the conversion of the case. Accordingly, the Court need not disallow fees on the basis that the Firm rendered services after the Trustee's position had been terminated. *See In re Roberts*, 80 B.R. 565 (Bankr. N.D. Ga. 1987) (Cotton, J.) (holding that compensation for services rendered by the trustee or an attorney on behalf of a Chapter 7 trustee after the conversion of the case could not be compensated from the debtor's Chapter 13 estate).

required, the novelty and difficulty of the questions, the skill required to perform the legal service properly, the preclusion of other employment by the attorney due to acceptance of the case, the customary fee, whether the fee is fixed or contingent, any time limitations imposed by the client or other circumstances, the amount involved and the results obtained, the experience, reputation, and ability of the attorney, the “undesirability” of the case, the nature and length of the professional relationship with the client, and awards in similar cases.

Here, the attorneys involved in this case, Neil Gordon and Michael Holbein, are experienced bankruptcy attorneys with excellent reputations. Neil Gordon is a highly experienced and very diligent Chapter 7 trustee, with approximately 25 years of experience, as well as a partner in a reputable Atlanta law firm. Michael Holbein also has approximately five years of experience and has diligently represented clients before this Court on many occasions. Both attorneys have excellent educational credentials, including degrees from well-respected law schools and, in the case of Mr. Gordon, an extensive body of scholarly work and memberships in various professional organizations. “On the issue of reasonable fees, ‘the court is itself an expert on the question and may consider its own knowledge and experience concerning reasonable and proper fees and may form an independent judgment either with or without the aid of testimony of witnesses as to value.’” *Schilling v. Moore*, 286 B.R. 846 (W.D. Ky. 2002) (quoting *In re WHET, Inc.*, 61 B.R. 709, 713 (Bankr. D. Mass. 1986)).

Accordingly, the Court will take judicial notice of the fact that both attorneys have

represented their clients well before this Court and have significant experience representing Chapter 7 trustees. The Court has also taken judicial notice of the fact that fees charged for similar work performed by attorneys representing Chapter 7 trustees before the Atlanta division of the Northern District of Georgia with approximately the same amount and type of experience as Gordon ranges from \$250 to \$335 per hour, with the average being approximately \$287 per hour. The hourly fees charged by associates with approximately the same amount and type of experience as Holbein appear to range from \$150 to \$250, with the average being approximately \$216 per hour.³ While the Firm's hourly fees are on the high end of these ranges, a substantial amount of the time spent by the Firm in this case was devoted to researching a complicated legal issue. Additionally, as noted above, the Court finds that Gordon's experience and reputation, as well as the fact that the Firm's services obtained such a favorable result for the Trustee and the Debtor's creditors, justify a fee on the higher end of the spectrum.

Much of the Debtor's argument for reducing the attorney's fees requested boils down to the bare equitable argument that it is simply unfair to make an elderly woman with a disabled son pay these fees and that the award of the fees will result in the inability of the Debtor to confirm her Chapter 13 plan. While the Court is sympathetic to the Debtor's plight and does not want to see the Debtor and her son lose their home, the fact remains that

³ See Case No.04-62059, docket no. 8; Case No. 04-61110, docket no. 12; Case No. 04-96713, docket no. 17; Case No. 04-93183, docket no. 17; Case No. 04-60305, docket no. 12; Case No. 04-91613, docket No.91613, docket no. 25.

the Debtor chose to transfer her home to her daughter for no consideration and failed to disclose it. Although the Debtor has explained her actions by stating that she was worried that her son would no longer have a place to live if she retained the Property, the Debtor knowingly made a false statement on her Statement of Financial Affairs. The Debtor now comes to the Court with unclean hands and asks that the Court consider the equities of the case. Additionally, the Debtor suggests that the Court further consider the public policy that favors allowing Debtors to pay their debts through Chapter 13. In an ordinary case, in which the debtor has been completely honest with the Court and her creditors, and in which the alternatives are payment of some dividend through a Chapter 13 case or a Chapter 7 case in which no or little distribution will be made to unsecured creditors, the Court would certainly favor a reorganization. However, in this case, the Debtor has been provided with ample opportunity to pay her creditors in full and keep her home. She simply refused to do the expedient thing and chose instead to convert her case to one under Chapter 13. Under the circumstances, the Court is not swayed by the fact that allowing the full amount of the fees requested may result in the Debtor's inability to confirm a Chapter 13 plan. The Court recognizes that, if the Debtor's Chapter 13 case fails, the Debtor's creditors will continue to have the protection afforded them by the fact that the Debtor retains possession of the Property, which contains significant equity. Again, the Court notes that this fact resulted from the work of the Trustee and the Firm, and they should be compensated for their time.

CONCLUSION

Having carefully considered the matter, it is hereby **ORDERED** that:

The application for compensation filed by Neil Gordon, in his capacity as Chapter 7 Trustee for the bankruptcy estate of Ruth Evelyn Conkle, and the law firm of Arnall, Golden, Gregory, LLP, is hereby **GRANTED**. All fees and compensation requested shall be entitled to payment as an administrative expense in accordance with the Debtor's Chapter 13 plan if confirmed, or in accordance with the priorities established by § 726 of the Bankruptcy Code in the event the Debtor's case is re-converted to a case under Chapter 7.

IT IS SO ORDERED.

At Atlanta, Georgia, this _____ day of January, 2005.

W. HOMER DRAKE, JR.
UNITED STATES BANKRUPTCY JUDGE

